

COMMITTEE CHARGE

On July 27th, 2009, Senate President Pro Tem Charlie Shields asked the Senate Commerce Committee to begin a review of the actions which lead to the withholding of critical information on unsafe E. coli levels at the Lake of the Ozarks and jeopardized the health and public safety of Missouri's citizens and its visitors.

Upon finding of the facts, the Committee was then charged to make recommendations to the General Assembly as to whether public policy, through state statute or rule making changes, were necessary to be made to ensure this unacceptable situation does not occur again in the future.

BACKGROUND

In 2005, DNR and Ameren UE signed a settlement agreement that provided DNR with \$15,000 a year for five years to implement a testing program aimed at water quality and the overall health of the Lake of the Ozarks. Beginning in 2007, 55 sites are tested once a month for five months - May, June, July, August, September and October. Half of the sites are tested one month, the other half the next month, with this alternating pattern continuing throughout the testing year. Volunteers from the Lake Ozark Watershed Alliance (LOWA) take the samples and then send them to the DNR lab in Jefferson City for testing. It takes 24 hours for the tests to incubate, then typically another day to do the analysis, quality checks and quality assurance. The results are normally finalized by the Thursday or Friday from the tests taken on Monday of the same week. Scott Robinett, the DNR employee in charge of the sampling program, then relays the results up the chain-of-command, and posts the results to LOWA's website as soon as the quality assurance is completed.

Since the program began in May of 2007, it has not been uncommon for coves to have E. coli levels above the EPA single sample maximum (SSM) of 235 colonies per milliliter of water. Historically, when this occurred, the results were posted on LOWA's website and press releases were sent out detailing the results.

DNR's Division of State Parks (Parks) operates numerous public beaches around the state including two public beaches at the Lake of the Ozarks, known simply as Public Beach #1 (PB#1) and Public Beach #2 (PB #2). For nine years Parks has tested the water at these beaches for E. coli weekly, closing the beaches when E. coli levels have exceeded the 235 SSM. This beach testing is separate and distinct from the testing conducted commensurate with the Ameren UE settlement, though in both instances the samples are analyzed by DNR's Environmental Services Program (ESP), who in turn reports the results back to the entity submitting the samples.

WHAT HAPPENED

On May 26th, 2009, this year's first samples were pulled by volunteers from the LOWA and sent to the DNR lab for analysis. The results were extraordinarily high with numbers above the SSM in more coves than ever before. In fact, 31 of the 56 samples taken had numbers above the SSM, and two of the coves had a reading higher than 2419 colonies per milliliter, more than ten times the allowable amount. Mr. Robinett informed DNR management that the sampling results were "high" but he was told to hold off on releasing the results. Despite his disagreement and protests, Mr. Robinett and the department did not release the testing results until June 26th, 2009 when the June testing results, which showed reduced concentrations of E. coli in the lake, were available. It is important to note that according to the alternating pattern of sampling, many of the sampling sites that tested high in May were not re-tested until July.

During this same period, Parks testing results from PB #1 on May 18th, 2009 revealed E. coli levels five times the SSM. However, Parks management did not close the beaches the following weekend (Memorial Day). On June 5th, PB#1 was closed due to high E. coli concentrations, and remained closed for all but three days in June while PB#2 was also closed because of high E. coli concentrations for 18 days in June. These extended and repeated closures indicated an ongoing, dangerous water-quality problem at the Lake of the Ozarks, but despite repeated media inquiries, DNR's senior management claims that they were not informed of this situation until the middle of June.

Lake area media outlets began questioning DNR about public beaches closures and the May and June Ameren UE testing results, but no official responses were given until June 19th and the Ameren UE sampling results from May were not released until June 26th. On July 16th, Karen Dillon from the Kansas City Star reported on the high E. coli levels and the lack of information about them from DNR.

THE OBSTACLES

Since the beginning of the committee's inquiry, the committee has encountered a series of executive level created impediments.

Not only were there individuals within DNR trying to disrupt and derail this process, but more importantly, there was a conscious effort to mislead the committee and the media outlets who were trying to report the facts surrounding the withholding of the E. coli results. Throughout the process, there was a clear effort to obstruct interviews of state employees and defiance on behalf of DNR to produce the requested documents.

Although the committee staff was finally able to interview the DNR employees nearly a month following the initial request, there was a clear effort within the executive branch to make this process as difficult as possible. On two separate occasions, committee staff traveled to DNR offices to perform interviews that had been scheduled with DNR employees. On both occasions, committee staff was forced to wait 45 minutes and were then denied access to those employees. Over the next two weeks, DNR Director Mark Templeton and Committee Chairman Brad Lager negotiated "ground rules" so that committee staff (the staff of elected officials) could interview state employees. Ironically, during this same time period when the DNR director was demanding legal counsel be present during senate interviews, Joe Bindbeutel, a key figure in the withholding of the E. coli report that had remained out of touch since mid-July, was suddenly offered up to the Kansas City Star for an exclusive interview, without an attorney present. The Committee later learned that this interview was arranged by Jack Cardetti, the Governor Nixon's press secretary.

On August 4th, 2009, committee staff submitted its first document request to DNR. The first piece of paper was finally produced on August 17th, 2009, nearly two weeks following the request. During the Attorney General's investigation, all requested documents were received within a couple days, however to be fair to the department, our request was much broader than that of the Attorney General. Once documents were received from DNR, there were numerous issues of concern. For example, the first batch of e-mails arrived in a format that could not be opened. Once staff was able to open the files, the e-mails were not in sequential order, contained no guide or directory, and were in unsearchable PDF files. As a result, there was no way for the staff to know where in the over 500,000 documents specific individuals' e-mails and specific dates of e-mail correspondence were located. In a discussion with the DNR legal counsel on August 27th, 2009, committee staff inquired if the e-mails produced were searchable in any way. The legal counsel for DNR said he had no idea if they were or weren't. Upon discussion with the outside vendor who was hired to put the e-mails into electronic format, it was learned that the DNR legal counsel specifically requested from the vendor that the e-mails not be searchable.

On August 25th, 2009 DNR's legal counsel told staff in a telephone conversation that every e-mail requested was produced and none were held back including those emails protected by attorney/client privilege. On September 8th, when Mr. Bozoian was interviewed on behalf of the committee, he reported that a number of e-mails were withheld by DNR and were not produced based up on the Sunshine Law, even though Sunshine Law exemptions did not apply to this inquiry. When interviewed, Mr. Bozoian was asked repeatedly if the committee was receiving all the documents it requested. He repeatedly refused to answer that question but ultimately did admit that DNR had indeed held back a number of documents. The privilege log later revealed that over 5,000 e-mails were withheld mainly because of exceptions in the Sunshine Law.

Not only were documents withheld and e-mails purposefully made difficult to manage, staff later learned that DNR has not provided to the committee all information it provided to others who made Sunshine requests. For example, the calendars received by the committee on August 17th, 2009 were without notes. Committee staff discovered this after receiving a document request from Karen Dillon of the KC Star. The committee staff was later told that this withholding of calendar documentation was an honest mistake made by clerical staff at DNR.

Finally, individuals within the Governor's Office were not forthcoming or completely honest in their handling of this incident. According to early statements from the Governor's Office, the Governor's Office was unaware of the testing results until June 23rd, 2009, when Joe Bindbeutel met with the Governor's chief of staff and briefed him on what had happened. However, during the interview with Susanne Medley, she informed committee staff that the Governor's Office was informed on May 29th, 2009, and not June 23rd, 2009.

According to Mrs. Medley, there was a meeting with her, Director Templeton and Jeff Mazur from the Governor's Office on June 1st, 2009. The committee has e-mails from Susanne Medley confirming that she was in contact with Jeff Mazur from the Governor's Office almost daily and that she was very involved in this issue. We also have an e-mail from Mark Templeton to Suzanne Medley on July 16th, 2009, the day the KC Star broke the story, saying "at least (Jeff) Mazur has been in the loop and I will connect with JW today." The committee also obtained Joe Bindbeutel's calendar which shows him meeting with the Governor's Office in person at least twice prior to June 23rd, 2009. Additionally, the committee obtained minutes from a June 12th, 2009 meeting with LOWA where Joe Bindbeutel tells to the group that, "The recent water testing has drawn the attention of the Director of DNR as well as Governor Nixon". While Bindbeutel has denied saying this, Scott Robinett confirmed during an interview with committee staff that he heard it and the woman taking the minutes stated in a KC Star article that if it was in the minutes, she heard it.

With this noted, it is only fair to point out that upon announcing Mark Templeton's suspension, pointed questions by the media forced both Jeff Mazur and Jack Cardetti to reveal that they deliberately deceived the press about their knowledge of, and involvement with, the high E. coli levels found in the May testing. At a minimum these two senior members of the Governor's staff were aware of the outrageously high E. coli concentrations revealed in the late May testing and failed to act upon the information appropriately thereby needlessly endangering the health and safety of Missouri's citizens and visitors.

WHAT THE COMMITTEE FOUND

In spite of delays and bureaucratic road-blocks, the committee staff has combed through volumes of documentation and conducted a number of face-to-face interviews to reveal the following:

Failure to Notify

Possibly the greatest failure lies in the fact that DNR failed to notify the Missouri Department of Health and Senior Services (DHSS) or any Lake Ozark area public health departments of the high May 26th, 2009 sampling. This is both disturbing and odd given the fact that DNR and DHSS have a memorandum of understanding requiring DNR to inform DHSS of any public health risks, an action that DNR took in every instance prior to the May 26th, 2009 test.

Denial of E. coli as a Public Health Risk

DNR officials have repeatedly said that they did not feel the need to release the high May 26th test results because there was no health risk, as individual E. coli colonies die off after two to four days. However, Parks told committee staff that they test on Mondays and then decide on Fridays whether or not to close the state park beaches based upon those Monday results. Their reasoning is because even though the E. coli colonies might have died off between Monday and the weekend, high E. coli likely means the presence of other dangerous bacteria in the water that could live longer. Unless the cause of dangerously high E. coli levels is determined, it is impossible to know whether or not additional E. coli colonies have found their way into the water between Monday and Friday.

Failure to Re-Test

In spite of the exceptionally high results, DNR failed to go back and re-test all the sites that reported these incredibly high results. Instead, department decision-makers were quick to embrace excessive rainfall as the culprit and to "analyze the data" to prove the point, at the risk of public safety.

Lack of Internal Communication

Communication at DNR between their different divisions and employees was lacking. Parks has been testing its beaches for E. coli for nine years and has its own set of beach closure protocols, yet the June beach closings were not relayed to DNR leadership until well after closures had already occurred. Although the Park's beach testing was separate from the Ameren UE sampling, the same employees ran the actual tests and reported the results, albeit to different individuals and programs. For some unknown reason, however, nobody reported the high beach testing results to departmental leadership, yet the high Ameren UE sampling test results were reported to DNR leadership almost instantly.

Sunshine Law Violations

DNR's dealing with requests for information was at minimum in violation of the spirit of the Sunshine Law. Numerous media and private individuals requested the Ameren UE testing data and information on the beach closures. These requests were either ignored or delayed. The explanation given by DNR officials is that no "formal" Sunshine Law requests were made. The law is clear, however, that there is no definition of a "formal" Sunshine Law request, and the law does not need to be cited specifically to be valid. Documents are presumed

to be open and the Sunshine Law is supposed to be given a liberal interpretation and application. Many of the DNR employees had not been given any Sunshine Law training, and some were designated as custodians of records for Sunshine Law purposes without their knowledge. Since this investigation was initiated, DNR has taken steps to address some of these transparency deficiencies.

Governor's Office Misleading Statements

From press accounts, the Governor's Office was unaware of the results until June 23rd, 2009 when Joe Bindbeutel met with John Watson and told him what had happened. However, e-mails and an interview of Susanne Medley indicate that she was in contact with Jeff Mazur almost daily, that she was very involved in the issue, and that she told Jeff Mazur about the high sampling results on May 29th, 2009, almost a month before the Governor's Office claimed they heard of the elevated E. coli levels. Additionally, when pressed by reporters, the Governor's spokesman, Jack Cardetti, admitted that he lied and knew about the test results before June 23rd, 2009. Interestingly, Susanne Medley, who is no longer with the DNR, but was at that time serving as the Department Communications Director, had no first-hand environmental experience until she was hired in January, yet was put in charge of releasing the E. coli results. Scott Robinett told the committee that she was the one who forbade him to release the sampling results as usual, and there is an e-mail dated June 25th, 2009 from Ms. Medley to Director Templeton saying that she approved taking down the "Beach Closed" signs from PB#1. It is alarming that a press liaison is approving the opening of beaches and in charge of releasing important scientific and public health data.

Chaos and a Lack of Leadership at DNR

Under current leadership, the Department of Natural Resources has become a department in chaos. Governor Nixon, after being "angrier than words can describe" suspended Mark Templeton for a lack of institutional control that resulted in abysmal failures and inaccurate information being conveyed to the governor. Since this review began, there have been numerous DNR employees who fearing for their jobs have privately shared their concern that the department lacks direction and leadership. It is concerning that a department with such a critical mission is failing the taxpayers of this state. Either the Director lacks the ability to lead the department and carry out the governor's policies, or Governor Nixon has failed to provide direction and clearly articulate his vision for the department. In either instance, Missourians are the ones paying the price.

Fundamental Flaws in DNR's Operations

Although Governor Nixon's Lake of the Ozark Water Quality Initiative has a laudable goal, the timing of this study and associated inspection sweep could not have been worse. Both occurred during the months when the lake, and surrounding houses, hotels, and motels, are least used. If, as Joe Bindbeutel indicated in his testimony, properties surrounding the lake are "straight-piping" sewage into the lake, it would be appropriate to test and inspect during a time

when these properties are most likely to be occupied so that these horrific violations, and subsequent environmental impacts, could be more easily discovered.

Regardless of the timing, Gov Nixon has implemented “a zero-tolerance policy for water quality violations found during the inspection sweep” and “rigorous scrutiny of new applications for wastewater discharge permits in the Lake of the Ozarks watershed”. Why has DNR not had a zero-tolerance for water quality for violations prior to this initiative, and why is DNR not already rigorously scrutinizing permits that allow wastewater to be discharged into the Lake of the Ozarks? The fact that DNR needs the Governor to prompt them to perform their statutory duties to protect water quality at the Lake of the Ozarks is as alarming and troubling as the department’s failure to release important public information.

E-Coli Did Make People Sick at the Lake

E. coli in the Lake of the Ozarks did make people sick. Both Joe Bindbeutel and Susanne Medley received e-mails from people who were sick or knew others who got sick after swimming in Lake of the Ozarks this summer. Undoubtedly there may have been more people from around the state, and possibly the country, who visited the Lake of the Ozarks this summer and became ill due to the high E. coli concentrations in the lake but did not know the cause so that they could report it or seek appropriate treatment.

CONCLUSIONS

The failure of DNR to appropriately disclose the high E. coli results violated the public trust and integrity of the department while putting the public health and safety of Missouri’s citizens and visitors at risk. This action is unacceptable. To have important, time-sensitive data that directly relates to public health and to not share this data with tourists, local residents, and health officials is a complete failure by the Department of Natural Resources.

The subsequent cover up and deliberate attempts to disrupt and derail this review undermine the accountability and transparency that is imperative to ensure reasonable and responsible government. May 2009 was the first time that the results of testing done in accordance with the Ameren settlement were deliberately withheld from the public. It is both inaccurate and irresponsible to shift or minimize this action.

Water quality is a serious issue at the Lake of the Ozarks, but also in other water bodies across the state. Water quality issues at the Lake of the Ozarks precede the Ameren settlement testing regimen and a comprehensive solution cannot rely solely on state government establishing a system of real-time testing and reporting. Governor Nixon’s Lake Ozarks Initiative has revealed a number of

weakness and deficiencies in the department's permitting and inspection activities and any future solutions must include thoroughly enforcing current laws via a robust permitting and inspection program. The legislature has a direct and immediate role to play in crafting state statute that will ensure the establishment of appropriate testing, timely reporting of results, robust permitting and inspection, and enforcement of current laws.

RECOMMENDATIONS

In order to better ensure that the Department of Natural Resources does not repeat this failure to protect public health and the environment, the Senate should consider legislation encompassing the following:

- 1) Ensure that a reliable E. coli testing program is in place at the Lake of the Ozarks. This testing, and commensurate analysis and reporting, should be conducted by DHSS. All samples collected by DNR will be tested by DHSS laboratory equipment and personnel and DHSS must publish E. coli testing results within forty-eight hours regardless of the implications or circumstances. Delays in releasing data are not permitted in any circumstances, and \$30,000 per year, for three years, should be appropriated for this effort.
- 2) Require the adoption of a plumbing code within three years in counties with a "water of the state" that borders or runs through a state or national park. This requirement shall pertain to all residential and commercial buildings.
- 3) Merge the Environmental Services Program into DHSS. ESP currently resides in a building in need of significant CI investment, so a phased relocation of personnel and systems from that building to the new DHSS laboratory is both timely and logical. This move will ensure greater communication of potentially dangerous environmental issues and will allow the state to more fully and efficiently utilize laboratory space in Jefferson City.
- 4) Empower and require DHSS to work with local public health agencies to conduct inspections and provide required oversight.
- 5) Provide data and resources to DHSS on-sight sewage staff, allowing them to better enforce the public health laws relating to on-sight sewage, which will have the ancillary benefit of protecting and improving water quality.
- 6) Affirm state government's responsibility to comply with both the letter and intent of the Sunshine Law. Any request for information, regardless of the form and medium, is a Sunshine Law request and should be treated as such. Similarly, DNR should establish and promulgate time-frames for releasing data, they should follow all establish disclosure requirements, and must also be responsible to release all data received from outside DNR such as date self-reported by companies.
- 7) DNR must establish a Chapter 640 statement that: "It is the state policy of the Department of Natural Resources to release all data in a timely

fashion and to ensure that the public is aware of the results of all testing programs and disclosure made to the department regarding the management of natural resources". This Chapter 640 statement should be amplified by the expressed acknowledgment, in writing, that the failure to release any information is a violation of the public trust and is unacceptable.

- 8) The Department of Natural Resources is lacking leadership and guidance. This has resulted in deep levels of mistrust by staff, by the Governor, by other elected officials and by the citizens of Missouri. Serious and substantive personnel changes are needed at DNR in order to regain lost trust and confidence. These changes can only be made by the Governor.
- 9) Ensuring water quality within the state is neither easy nor does it come without a price. Even though in the Governor's proposed 2011 budget, the resources available for these services have been reduced, the Department of Natural Resources must identify Missouri's water quality funding needs and bring forward a plan for future clean water fees. DNR should work closely with the Clean Water Commission and stakeholders to determine these fee levels so that the Legislature may consider in the 2010 regular legislative session if the proposed fees are reasonable and acceptable.
- 10) There should be a full accounting of cost incurred as a result of DNR's withholding the May sampling data including, but not limited to, ALL departmental cost including personnel, outside vendors used in the preparation of documents, senate staff time, etc.